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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1290

WILLIAM BINDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner William Binder prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on December 16, 1971.

Opinion Below

The opinion of the Court of Appeals in this case has not yet been reported. It is reprinted as Appendix "A" hereto, *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered on December 16, 1971. A timely petition for rehearing and for rehearing *in banc* was denied on February 8, 1972. The judgment of the Court of Appeals and the orders denying

rehearing and rehearing *in banc* are reprinted as Appendix "B", *infra*. Under date of March 7, 1972, Mr. Justice Marshall granted petitioner an extension of time to April 8, 1972, to file the petition for certiorari herein. The jurisdiction of this Court is invoked under Title 28, United States Code, §1254(1).

Questions Presented

1. Whether the prosecution of petitioner and others for conspiracy and substantive counts to violate the Interest Equalization Tax Act was constitutionally defective as violating the *ex post facto* clause of the Constitution, where the indictment alleged and proof showed that the bulk of the transactions occurred prior to the passage of the act, with the case submitted to the jury without any distinction as to pre-enactment and post-enactment conduct.

2. Whether there was sufficient proof in the record to support petitioner Binder's conviction.

3. Whether count 6 of the indictment properly alleged felonious tax evasion by the alleged preparation of a false and fraudulent quarterly interest equalization tax return, where the count failed to allege the filing of the return and the government conceded that such return was not filed.

Constitutional Provision and Statutes Involved

Constitution of the United States
Article I, Section 9, Clause 3.

No Bill of Attainder or *ex post facto* Law shall be passed.

Title 18, United States Code

§2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

§371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Title 26, United States Code

§7201. Attempt to evade or defeat tax

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution".

Essentially, this case involves the tax statute known as the Interest Equalization Tax Act, Title 26, United States Code §4911, *et seq.*, added by Pub. I. 88-563, Act of September 2, 1964, 78 Stat. 809. Except for the following

provision (§7241 of Title 26, United States Code), the substantive provisions of the Interest Equalization Tax Act are not before the Court in this case. Accordingly and by reason of its length, this statute is not reproduced herein.

§7241. Penalty for fraudulent equalization tax certificate.

> Any person who, on or after the date of the enactment of the Interest Equalization Tax Act, willfully executes a certificate of American ownership or blanket certificate of American ownership described in section 4918(e), or a certificate of sales to foreign persons described in section 4919(b)(2), which is known by him to be fraudulent or to be false in any material respect shall be guilty of a misdemeanor and, upon conviction thereof, shall for each offense be fined not more than $1,000, or imprisoned not more than 1 year, or both. Added Pub. L. 88-563, §6(b), Sept. 2, 1964, 78 Stat. 847.

STATEMENT OF THE CASE

The Indictment

The indictment in this case contained 13 counts. Count One alleged generally a conspiracy to violate Title 26, United States Code §§7201 and 7206(2) and to defraud the United States in its function to administer the Interest Equalization Tax Act. The remaining substantive counts alleged the preparation and filing of false and fraudulent Interest Equalization Tax Act quarterly returns (except for count 6, where the tax return was not filed) and false and fraudulent applications to discharge property from

federal tax liens. At the commencement of the trial, the prosecutor withdrew counts 3, 5, 7, 8 and 13 from the case; and at the end of the government's case, the trial court directed the acquittal of petitioner Binder on counts 9 through 12, inclusive. Thus only counts 1, 2, 4 and 6 were submitted to the jury as to Binder; and he was acquitted by the jury of count 2 and convicted of counts 1, 4 and 6.

Accordingly, in this petition an analysis will be made only of counts 1, 4 and 6, and reference to other counts will be made only when necessary for a proper presentation of petitioner's case.

The statute with which this case is concerned is the Interest Equalization Tax Act; Act of September 2, 1964, Title 26, United States Code, §§4911-4920, inclusive, 6680, 6681 and 7241; Public Law 88-563; 78 Stat. 809. Although examination of the substantive provisions of this statute is not necessary to the adjudication of this case, nevertheless it is important to describe its enactment history to set in proper perspective petitioner's argument that his prosecution under this indictment, and of the three counts of which he has been convicted, constituted a violation of the *ex post facto* clause of the Constitution of the United States (Article 1, §9, Clause 3).

On July 18, 1963, President John F. Kennedy sent a message to Congress in which he first recommended the enactment of the Interest Equalization Tax Act. The purpose of the proposed legislation was to curb the outflow of American capital into foreign security investments by the imposition of a special excise tax on such security transactions. Part of the proposal included taxing all such security transactions retroactively to the date of the president's initial recommendations. The statute finally was enacted on September 2, 1964, with the retroactive feature included as to the imposition of civil liability for

these taxes. The penal provisions of this special statute were specifically made prospective only. See Title 26, United States Code §7241; and compare §§6680 and 6681 thereof. See also Senate Report No. 1816, 88th Congress. Considering that the Interest Equalization Tax Act became law on September 2, 1964, it becomes necessary to examine the use of this date in the analysis of counts 1, 4 and 6 of the indictment.

Count 1 alleged a general conspiracy among defendants Henry Scharf, William Binder, Max Blauner and Edward Samuels, together with various co-conspirators not named as defendants, as follows:

> "From on or about the 1st day of November, 1963, up to and including the date of the filing of this indictment (the defendants and co-conspirators conspired)—to violate Sections 7201 and 7206(2), Title 26, United States Code, and to defraud the United States by misleading, impeding, hindering, obstructing and defrauding the United States Treasury Department, Internal Revenue Service in its lawful function to ascertain, compute and collect the proper Federal Interest Equalization Tax liabilities of the defendants".

Pleading paragraphs 2 through 6, inclusive alleged the ostensible effectuation of the conspiracy through the use of various brokerage accounts, a "dummy" owner of the alleged purchased foreign securities, and the preparation and filing of false certificates of American ownership of the foreign securities and of interest equalization quarterly tax returns. Sixteen overt acts were pleaded as in furtherance of the conspiracy, with the first 12 allegedly occurring prior to September 2, 1964. Only the last four overt acts charged conduct after the enactment of the statute, with No. 13 covering a period both before and after enactment;

and of these last four, the prosecutor withdrew the last three (Nos. 14, 15 and 16) before the case was submitted to the jury. Binder was named only in one overt act, No. 12, alleging that on or about August 20, 1964, defendant Henry Scharf met Binder and co-conspirator Roy M. Hazael in Detroit, Michigan. Thus, as to the overt acts pleaded as in furtherance of the conspiracy as submitted to the jury, only one, No. 13, covered any period after September 2, 1964, and this one did not involve Binder.

Count 4 alleged that from "on or about August 1, 1964, up to and including January 29, 1965", the defendants attempted to evade the interest equalization tax in the amount of $2,346,784.51, due and owing by defendant Henry Scharf for the fourth quarter of 1964, by finding a living person willing to lend the use of his name for opening stock trading accounts; maintaining such accounts and ordering the purchase of securities subject to the interest equalization tax, which were really the accounts of defendant Scharf; preparing, signing and filing false and fraudulent certificates of American ownership for such foreign securities purchases; and a false and fraudulent interest equalization tax return for the fourth quarter of 1964, in the name of Roy Hazael, instead of the true purchaser of said securities and true taxpayer, defendant Henry Scharf, all in violation of Title 26, United States Code, §7201 and Title 18, United States Code, §2.

Count 6 alleged the same offense as count 4, except that the quarterly interest equalization tax return was for the first quarter of 1965; the amount of tax allegedly due was $1,180,704.16; and the period covered by the alleged offense was from on or about August 1, 1964, to and including April 30, 1965. The charging language was virtually identical with that of count 4, except it alleged that the quarterly tax return was "prepared for filing", without any allegation that the return actually was filed.

Pre-Trial Motions

Shortly after the indictment was filed, petitioner and the other appearing defendants, filed pre-trial motions seeking various relief. The principal motions of the defendants consisted of an attack upon the indictment as constituting on its face a violation of the *ex post facto* clause of the Constitution, by charging as criminal conduct prior to the enactment of the Interest Equalization Tax Act. The motions seeking dismissal of the indictment on this ground were denied by the district court.

The Record

The record consists of the complete transcript of the pre-trial proceedings, the trial and exhibits received in evidence, as well as the proceedings in the Court of Appeals.

The Facts

Petitioner Binder makes the argument that there was no proof at all in the record to support his conviction; accordingly, it will be necessary to set forth in some detail all of the evidence offered against him.

The only witness to mention Binder's name throughout this trial was co-conspirator Roy Hazael. His complete testimony is reported at Appellant's Appendix pp. 465-635. The government also read portions of Binder's grand jury testimony to the jury, as purporting to constitute either admissions against interest or false exculpatory statements on his part. See App. App. 749-774. Binder's counsel read to the jury the portions of this grand jury testimony omitted by the prosecutor, so as to have his complete grand jury testimony before the jury. See App. App. 775-777.

The basic scope of this case involved the activities of defendant Henry Scharf,[1] who had been engaged in a securities arbitrtage operation, buying securities in the New York stock market and selling them simultaneously in the Canadian market. Following the proposal by President Kennedy for the imposition of the Interest Equalization Tax Act, Scharf apparently expanded and increased his arbitrage activities. Operating out of a Westport, Connecticut office, through the use of two personally owned firms, Management House, Inc., and Weston Trading Corp., he engaged in these securities transactions on an extensive scale. However, in order to accomplish his apparent purpose to avoid the payment of the interest equalization tax, Scharf enlisted co-conspirator Hazael, a Canadian resident American citizen, to act as his nominee or "dummy", to buy and sell the securities and to execute certificates of American ownership and quarterly tax returns required under the Interest Equalization Tax Act, which were to be filed with the Internal Revenue Service. To accomplish his purposes, Scharf created an elaborate scheme, involving many persons. In setting up his operation it is fair to state that many persons were innocently and unwittingly enveigled into Scharf's scheme, including, at least, petitioner William Binder.

Hazael testified that he was born in England of Canadian parentage, that he grew up in Ontario, Canada, that he was employed in the United States at Detroit, Michigan, and was there drafted into the American Army in 1952 (App. App. 465-469). While serving in the Army he was naturalized as an American citizen (470). Following his

[1] Scharf was not brought to trial with the other defendants. Following the filing of the indictment in this case, he disappeared and has not been seen or heard from since that time. Many persons connected with this case believe him to be dead. The government adopted the argument that he is a fugitive to justify its four year delay in bringing this case to trial.

discharge from the Army, Hazael returned to Canada where he lived and again worked in Detroit (474). He married a Canadian girl and they and their children live in Canada (475-476). After holding a variety of jobs, Hazael worked for Inland Tool and Manufacturing Company in Detroit, handling the control of books for parts ordered by various automobile manufacturers (479). During the course of this employment he came to know Binder, who operated a business known as Dumetals Painting Company in Detroit. Dumetals painted various small parts manufactured by Inland Tool for use in the assembly of automobile gear shifts (480-481).

Hazael testified on direct examination that one day during the summer of 1964, Binder telephoned him and arranged to meet him (482). Binder asked Hazael at this meeting if he would be interested in a job and arranged for Hazael to fly to New York that evening to meet Henry Scharf. Hazael agreed and Binder gave him money to pay his air fare (483-484). In New York Hazael met Scharf and another man, where Scharf discussed a job proposition with Hazael (486). The one essential condition of the job offer was that Hazael had to be an American citizen residing in Canada, and that he had to sign numbers of forms, and that was all he had to do (487). At that time Hazael did not know what the forms were or what was involved in the entire transaction (488-489).

Following Hazael's return to Detroit the same night as his initial meeting with Scharf, the next day or several days later Hazael received a call from Scharf asking to meet him at Binder's plant, which he did. At the meeting held that evening at Dumetal, Scharf elaborated on his job offer to Hazael (492-495). Hazael testified that Binder was present at this meeting, but not necessarily during the entire conversation (493), and that Scharf did all the

talking (492-498). Binder did not participate in the conversation in any way (497). The subject matter of the conversation involved an elaboration by Scharf of how the job would operate, about the buying and selling of the stocks and the signing and filing of the certificates (494).

Hazael accepted Scharf's job offer and entered into the operation (498). He signed many certificates of American ownership (Form 3650, I. R. S.), several interest equalization quarterly tax returns (Form 3780, I. R. S.) and other documents sent to him by Scharf's firm, Management House, Inc. He made a trip to New York and two to Toronto, Ontario, all at Scharf's behest, with his expenses paid by Management House. All trips were to stock brokerage houses. He also received a number of checks from Management House, in payment of his weekly salary. See e.g. Exhibits 18, 19, 20, 21, 23, 24, 25, 26, 27, 28 and 29 (532, 536). Hazael identified each of these checks as representing his salary, the first one (Exhibit 18), dated August 27, 1964, for $225 (536), and the last one (Exhibit 29), dated February 2, 1965, for $641.15. He denied receiving two certain checks out of this group, drawn to his order, Exhibits 14 (for $7,500, dated December 15, 1964) and 15 (for $1,500, dated February 23, 1964).

During the period of time covered by this employment, Hazael had a number of telephone conversations with Scharf and Scharf was with him on the occasions of his New York and Toronto trips (520, 521, 507, 510, 544). During all of the period covered by this employment, Hazael had no communication with Binder. Also during this period, Hazael received many stock purchase and sale confirmations from the brokerage houses at which Scharf had opened accounts in his name (515). Hazael also received interest equalization quarterly tax returns to be signed and filed. Two of these returns were filed, for the

retroactive period (Count 2 of the indictment) and for the fourth quarter of 1964 (Count 4). The return for the first quarter of 1965 was prepared and signed by Hazael, but it was never filed. The government conceded this fact when Binder moved to dismiss count 6 of the indictment (1217).

On cross-examination Hazael conceded that he never mentioned Binder to the treasury agents who interviewed him at length about his part of this affair (627), and to his knowledge Binder played no part and did not participate in the activities of buying and selling securities. Binder also did not have anything to do with the preparation and signing of interest equalization tax returns and certificates of American ownership (627-628). Except for arranging Hazael's initial meeting with Scharf, and giving Hazael four or six $150 payments in cash, Binder had no connection with this matter, according to Hazael (617-618, 627-628).

Hazael even conceded that as to the meeting held with Scharf at Dumetals Painting (Binder's office), he had told a revenue agent of the Internal Revenue Service, one Burton S. Roth, on June 3, 1966, that all Binder did at this meeting was to introduce Hazael to Scharf and a man named Sol and then left the office and did not participate in the conference (614). Scharf also conceded that he testified before the Grand Jury on December 3, 1965, that on August 20, 1964, at the Dumetals Painting office meeting with Scharf and another man, Binder was not present during the conversation he had with Scharf (612).

Thus there was nothing in the record to show Binder's knowledge of Scharf's affairs with Hazael, or any proof of Binder's participation in the scheme developed by Scharf, to defraud the government in the Interest Equalization taxes. Actually there was a sharp divergence between Hazael's version of his acquaintanceship with

Binder, and Binder's version as related in his grand jury testimony. But none of this divergence in versions had anything to do with Binder's knowledge of Scharf's schemes or his participation therein.

Finally, there was no proof at all that Binder knew or had anything to do with any of the other defendants or co-conspirators.

It should be noted that the opinion below characterized Binder as a "long-time Scharf associate" (App. "A", p. A-5), although there was no proof of this fact in the record. When the government used identical words in its appeal brief to attempt to tie Binder to Scharf, Binder objected in his reply brief to this characterization, pointing out that his acquaintance with Scharf was very slight. Binder also reprinted as an appendix to his reply brief a portion of his grand jury testimony showing his slight acquaintance with Scharf and the government's knowledge of this fact. Nevertheless, the government sought to transform this slight acquaintance into an invidious association by the use of the foregoing glittering generality, which the court below adopted in its opinion without considering its lack of support in the record.

The court below also treated Binder's grand jury testimony as false exculpatory testimony, when it really amounts to nothing of the sort. Firstly, this testimony simply was Binder's version of his relationship with Hazael, and did not refer at all to the transactions involved in this case. Secondly, there was no corroboration of Hazael's version of his acquaintance with Binder. Thirdly, Hazael testified affirmatively that Binder had no knowledge of or participation in Scharf's schemes in which Hazael played a key role. Finally, there was no proof at all that Binder participated in or had knowledge of Scharf's schemes or the conspiracy alleged in the indictment.

Following the jury's verdict, Binder was sentenced to pay a fine of $2,000, and a two year probationary term.

Petitioner Binder incorporates by reference herein the questions and arguments presented in the petitions for writs of certiorari filed by his co-defendants Max Blauner and Edward Samuels, to the extent that they may be applicable to his case.

Reasons for Granting the Writ

The issues in this case are of constitutional dimensions, involving the construction of a substantive provision of the Constitution.

1. The prosecution of petitioner Binder and his co-defendants Blauner and Samuels, for conspiracy and substantive violations of the Interest Equalization Tax Act (26 U. S. C. §4911, *et seq.*) was constitutionally defective as violating the *ex post facto* clause of the Constitution (Article I, §9, cl. 3), where the indictment alleged and the proof showed that the bulk of the transactions occurred prior to the passage of the act (September 2, 1964), with the case submitted to the jury without any distinction as to pre-enactment and post-enactment conduct.

As can be seen from the conspiracy count of the indictment, the largest part of the arbitrage transactions in which Scharf engaged took place prior to September 2, 1964. From the moment the indictment was filed the defendants took the position that the charges against them violated the *ex post facto* clause. Pre-trial motions attacking the indictment on this ground were filed; and when the case was called for trial four years later, the attorneys for the defendants clearly reiterated their contentions that this prosecution violated the *ex post facto* clause

(339; 792-794). The context in which this position was first restated at the trial was their objection to a line of proof as to transactions commencing in March, 1964:

> "The defendants contend that the *operative periods in this case are on and after September 2, 1964*" (339). (Emphasis supplied.)

They were granted a continuing objection to all proof offered as to pre-enactment transactions (339, 340). Nevertheless, the trial judge received all of the government's proof without distinction as to pre- or post-enactment conduct, treating the conspiracy as one continuing enterprise between November 1, 1963, and the date of the indictment (November 29, 1966) (1239-1240); and specifically directing defense counsel not to refer to or argue their *ex post facto* contentions to the jury (1078). Moreover, the trial judge denied the defendants' request to charge the jury, No. 20, to the effect that the jury was not to "consider alleged actions of defendants prior to that date (September 2, 1964) for the purposes of determining whether or not there was an unlawful conspiracy as the law it is alleged the defendants violated was not in effect" (1071-1072).

The court of appeals stated that "each appellant reaffirmed his participation in the conspiracy after September 2, 1964" (*infra*, p. A8) and thereby determined that the *ex post facto* clause was not violated by this prosecution, citing *Christianson* v. *United States*, 226 F. 2d 646 (8th Cir., 1955), cert. denied 350 U. S. 994 (1956). What the court failed to note was that the reason the Eighth Circuit affirmed the *Christianson* conviction was the clear distinction and delineation made in that case between pre-enactment and post-enactment conduct. There the district court carefully instructed the jury that they could not convict the defendant upon pre-enactment conduct, but

had to find the defendant guilty of the conspiracy charge on post-enactment conduct only. Here the district judge refused to make any distinction between pre-enactment and post-enactment conduct, and treated the charges in the indictment, the proof at the trial, the summations of counsel and his own charge in terms of a continuing enterprise in which the date of enactment of the violated statute was not to be considered by the jury, or even mentioned by counsel to the jury during their summations.

It was this petitioner who cited the *Christianson* case to the court of appeals, complaining that the district court utterly failed and refused to follow its teaching and rationale. The court of appeals here turned *Christianson* around and cited its holding as somehow supporting the affirmance of the judgment below. This prosecution was conducted and the trial held as though the *ex post facto* clause did not exist.

It is submitted that the indictment in this case and the proof offered at the trial clearly violate the *ex post facto* provision of the Constitution. *Calder* v. *Bull*, 3 Dall 386, 390 (1798), per Chase, J.; *Fletcher* v. *Peck*, 6 Cranch 87, 138 (1810), per Marshall, Ch. J.; *Kring* v. *Missouri*, 107 U. S. 221 (1882); *Beazel* v. *Ohio*, 269 U. S. 167; *Woxberg* v. *United States*, 329 F. 2d 284, 293 (9th Cir., 1964, Barnes, C. J.). Cf. *Ross* v. *Oregon*, 227 U. S. 150, 161-164 (1913).

In the earliest case, *Calder* v. *Bull*, Mr. Justice Chase wrote in part that the *ex post facto* clause is violated when "1st. Every law that makes an action done before the passing of the law and which was innocent when done, criminal" (3 Dall 386, 390). In *Fletcher* v. *Peck*, *supra*, 138, Mr. Chief Justice Marshall defined an *ex post facto* law in the following terms:

> "one which renders an act punishable in a manner in which it was not punishable when committed."

He continued:

> "No more beneficent provision is found in the Constitution for the protection of the individual and it must be and will be enforced on behalf of a bad citizen or criminal as well as a good citizen."

In *Beazell* v. *Ohio, supra,* this Court wrote as follows:

> "It is settled by decision of this Court so well known that their citation may be dispensed with that any statute which punishes as a crime an act previously committed, which was innocent when done . . . is prohibited as ex post facto. The constitutional prohibition and the judicial interpretation of it rests upon the notion that laws, whatever their form, which purport to make innocent acts criminal after the event . . . are harsh and oppressive and that the criminal quality attributable to an act either by legal definition of the offense . . . should not be altered by the legislative enactment, after the fact, to the disadvantage of the accused."

Very recently the Ninth Circuit struck down a prosecution under the Landrum-Griffin Act as violative of the *ex post facto* clause, in the following holding in *Woxberg* v. *United States, supra,* 293 (per Barnes, C. J.):

> "The Act (Landrum-Griffin Act, effective September 14, 1959, Title 29, United States Code, §401, *et seq.*) could not make a federal crime out of acts of a defendant which prior to that time had not been federal crimes, but acts punishable under state law. To make the acts retroactively criminal would have constituted an *ex post facto* application of §501(c), and would be violative of Article I, §9(3) of the United States Constitution."

There is no doubt that the prosecution in this case rests in major part upon evidence of acts done long before the

enactment of the Interest Equalization Tax Act. The indictment so alleges, the proof so shows. The prosecutor argued that the wide public dissemination of the president's request for this special tax statute put the whole country on notice, and that as a result retroactive application of this statute for criminal prosecutions is permissible. The court of appeals appears to have adopted this argument in its opinion.

Although count 1 of the indictment alleged a continuing conspiracy, the operative part, the agreement part, occurred prior to the effective date of the statute, September 2, 1964. Unless this criminal agreement was reaffirmed in material part following the critical date, there was no substantial proof of the conspiracy. See *Christianson* v. *United States*, 226 F. 2d 646 (8th Cir., 1955). Apart from the wholly prejudicial nature of evidence submitted in support of the criminal conspiracy purportedly of a criminal character at a time when such conduct was not denounced by any criminal statute, the treatment of all the proof as supporting a continuing conspiracy was also prejudicial.

There was no instruction to the jury to separate the charges or the proof in this case into pre-enactment and post-enactment periods. The defendant's request that the jury be so instructed (Request No. 20) was specifically denied by the trial judge (1072). In the court of appeals the government argued that Request No. 20 was "off the mark." Even if this be so, in its precise language, the trial judge knew the contentions of all defendants and their theory of this case, and he should have fashioned a charge to meet their contentions and theory of the case. While it is true that the trial judge need not instruct in the precise or exact language of the requests, nevertheless the substance of defense theories by proper requests must be given to the jury. *Sugarman* v. *United States*, 249 U. S.

182; *United States* v. *Kushner*, 135 F. 2d 668, 674 (2nd Cir., 1943); *United States* v. *O'Connor*, 237 F. 2d 446, 447, fn. 8 (2nd Cir., 1956).

As to the substantive counts, charging the preparation and filing of false tax returns, the proof of transactions prior to the effective date of the statute were not part of the criminal acts themselves, and thus should not have been received in evidence. Nor did they qualify as proof to support the necessary allegation of criminal intent, since there can be no criminal intent where the conduct is not and cannot be criminal without a statute denouncing it as such.

It is clear that this prosecution violated the prohibition against *ex post facto* laws contained in the United States Constitution. Throughout these proceedings, from the moment the indictment was filed, all defendants maintained the position that this prosecution was in violation of the *ex post facto* clause. They filed pre-trial motions attacking the indictment; they let the trial judge know that they objected to proof of acts prior to the statuory enactment; and made a specific request to charge addressed to this subject, which was denied. Thus it cannot be argued that they waived their rights in attacking the *ex post facto* nature of this case.

Accordingly, for all of these reasons certiorari to review this conviction should be granted.

2. There was not sufficient proof in the record to support petitioner Binder's conviction. All of the testimony in this case concerning Binder is to be found in the complete testimony of co-conspirator Roy M. Hazael (465-635). From this testimony it is clear that all Binder did was to introduce Hazael and Scharf, permit his office to be used for a meeting between them, and later on to pay Hazael four or six payments of $150 each. From this meagre

proof, the prosecution fashioned a theory that Binder knowingly participated in the elaborate schemes of Scharf to cheat the government out of interest equalization taxes on international securities transactions. See counts 1, 4 and 6 of the indictment.

Ordinarily, it is difficult for a defendant in a conspiracy case to make his own defense in a situation where there is evidence of wrong doing on the part of persons he knows or with whom he is associated. (See Mr. Justice Jackson's concurring opinion in *Krulewitch* v. *United States,* 336 U. S. 440, 453 (1949).) But here the record is crystal clear that Binder had no connection with or participation in the Scharf schemes. Nor is there any proof that he did. He did not know the other defendants and there is nothing to show that he knew any of the co-conspirators named in the indictment.

Moreover, as to the substantive counts of which he was convicted, counts 4 and 6, these counts charged him with "aiding and abetting" in the preparation and filing (as to count 4) of false interest equalization quarterly tax returns. There is absolutely no proof of this allegation. The mere membership in a conspiracy, is not in and of itself, proof beyond a reasonable doubt, of aiding and abetting in the violation of these substantive counts. *Nye & Nissen* v. *United States,* 336 U. S. 613 (1949) and *Pinkerton* v. *United States,* 328 U. S. 640 (1946), do not go that far. At the times of the preparation, signing and filing (as to count 4) of these tax returns, Binder is not shown to be associated with Scharf or Hazael in this scheme.

The case as to Binder should not have been submitted to the jury, as a matter of law. Accordingly, certiorari should be granted to review his conviction.

3. Count 6 of the indictment did not properly allege felonious tax evasion by the alleged preparation of a false

and fraudulent quarterly interest equalization tax return, where the count failed to allege the filing of the return and the government conceded that such return was not filed.

It was conceded by the prosecutor that the quarterly interest equalization tax return for the first quarter of 1965, described in count 6 of the indictment was not filed (Exhibit 119, 1217). Also, that this count carefully did not allege that it was filed (1217), but simply stated that it was "prepared for filing" (App. 20a, paragraph 1 (d)). Since this tax return was not filed, it could not constitute a crime. Notwithstanding all the fraud allegations, the failure to file this return fell short of completing the offense.

The prosecution treated count 6 as a felony, and the defendants Blauner and Samuels each was sentenced to a term of imprisonment in excess of one year on said count (See Docket Entries, p. 5). If this prosecution was for failure to file a tax return, then the operative statute would be Title 26, United States Code, §7203, a misdemeanor statute. But it was not such a prosecution, according to the government's contentions.

When Binder moved in the court below to dismiss count 6, the trial court stated that the preparation of a false tax return with intent to evade tax would constitute a crime (1217), and accordingly, filing this return was not an essential element of the offsense. This holding would mean that an inchoate offense, such as this one, could be established as completed by the mere preparation of such a return, even though the preparer (or his principal) decides to abandon the scheme by not filing the false return. It is submitted that such view of the law is at variance with many cases holding that the non-act of failing to file a tax return, albeit a false or fraudulent one, cannot constitute a felony. See, e.g. *United States* v. *Mesheski*, 286 F. 2d 345, 346 (7th Cir., 1961),

where the court held that the mere failure to file a return cannot constitute a felony:

> "Neither defendant nor the government has cited any published case directly in point. The parties are agreed that mere failure to file a return and pay a tax does not constitute a wilful attempt to evade or defeat the tax. There must be something more, some affirmative positive act to attempt to defeat or evade the tax. *Spies* v. *United States*, 1943, 317 U. S. 492, 500, 63 S. Ct. 364, 87 L. Ed. 418; *United States* v. *Bardin*, 7 Cir., 1955, 224 F. 2d 255, 260; *Bridgeforth* v. *United States*, 7 Cir., 1956, 233 F. 2d 451, 453."

Although this case is not directly in point on this issue in this case, it points up the fact that where a return is not filed, as here, no felony prosecution can follow.

It is to be noted that the parties, Scharf and Hazael, apparently abandoned their scheme on the interest equalization tax after the matter became public. Thus it is arguable that the false return for the first quarter of 1965 was not intended to be filed, since it was not filed, and that the crime charged in count 6 was never completed.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

DANIEL H. GREENBERG,
Counsel for Petitioner.

April 3, 1972.

APPENDIX "A"

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 170, 183, 184—September Term, 1971.

(Argued October 1, 1971 Decided December 16, 1971.)

Docket Nos. 71-1434,
71-1440, 71-1810

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM BINDER, MAX BLAUNER and
EDWARD SAMUELS,

Appellants.

Before:

LUMBARD, MULLIGAN and OAKES,
Circuit Judges.

Appeals from judgments of conviction for conspiracy, 18 U.S.C. §371, attempted evasion of the Interest Equalization Tax, 26 U.S.C. §7201, and aiding in and procuring the preparation of fraudulent Interest Equalization Tax returns, 26 U.S.C. §7206(b); 18 U.S.C. §2, in the United States District Court for the Southern District of New York, Mansfield, *J.* and a jury.

Affirmed.

HAROLD F. MCGUIRE, JR., Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern

District of New York, and Peter F. Rient, Assistant United States Attorney, on the brief), *for Appellee.*

DANIEL H. GREENBERG, New York, N. Y., *for Appellant William Binder.*

ARTHUR HIRSCH, New York, N. Y. (Alan Scribner, on the brief), *for Appellant Max Blauner.*

FREDERIC BLOCK, Centereach, N. Y., *for Appellant Edward Samuels.*

LUMBARD, *Circuit Judge*:

William Binder, Max Blauner and Edward Samuels appeal their convictions for conspiracy and substantive offenses designed to evade payment of approximately $7 million owed under the Interest Equalization Tax (I.E.T.) on the trading of $45 million worth of foreign issue stocks in 1964 and 1965. We affirm the convictions.

The principal contention of the appellants is that their convictions are in violation of Article I, section 9 of the Constitution which provides "No Bill of Attainder or *ex post facto* law shall be passed" as the government was allowed to prove what the defendants had done prior to the passage of the statute on September 2, 1964. We find no merit in this argument.

The indictment, filed November 29, 1966, contained 13 counts, of which we need to note only eight.[1] Count 1

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[1] Counts 3, 5, 7 ,8 and 13 were dismissed during the trial, and, as to Binder, the court also dismissed counts 9 through 12. The jury acquitted Binder on count 2.

Judge Mansfield sentenced Blauner and Samuels to 18-month prison terms on each count, the terms to run concurrently. Binder was fined $2,000 on the conspiracy count; sentence on counts 4 and 6 was suspended and he was placed on probation for two years.

charged Henry Scharf and the three appellants with conspiracy from November 1963 to February 1965 to evade the I.E.T. and defraud the United States by filing false and fraudulent returns for the quarters ending September 30, and December 31, 1964, and March 31, 1965. 18 U.S.C. §371. Counts 2, 4 and 6 charged all defendants with attempted evasion of Scharf's I.E.T. 26 U.S.C. §7201. Counts 9 through 12 charged all defendants with aiding, procuring and counseling the preparation and presentation of false and fraudulent I.E.T. returns on November 27 and November 30, 1964, and February 1, 1965. 26 U.S.C. §7206(2); 18 U.S.C. §2. Binder was convicted on Counts 1, 4 and 6, and Blauner and Samuels on Counts 1, 2, 4, 6, 9, 10, 11 and 12. Scharf, being a fugitive, was severed from the trial.

The enactment on September 2, 1964 of the I.E.T. law, 26 U.S.C. §4911, *et seq.*, was preceded by many months of discussion in the Congress, which followed a message to Congress from President Kennedy on July 19, 1963, regarding methods of reducing the flow of capital funds from the United States. Designed to correct the flow of short-term capital from the United States, the I.E.T. law levied an excise tax of up to 15% on the acquisition of foreign-issue stock by United States citizens from non-citizens.

As soon as it became known in financial markets, about March 1964, that passage of the I.E.T. was likely, American-owned foreign stock sold to United States citizens commanded a premium over foreign-owned foreign stock sold to United States citizens because no I.E.T. would become due on the former sales. Thus, in the few months prior to the enactment of the I.E.T., an American could purchase foreign-owned foreign stock and sell it at a small profit as American-owned foreign stock. This arbitrage profit, however, was not enough to cover the

amount of the I.E.T. that would come due if the tax were passed.

To curb the capital flow while Congress was considering the legislation and to avoid arbitrage speculation, the President's original message to Congress on the I.E.T. asked that the tax be made retroactive. 109 Cong. Rec. 12,806 (Senate), 12,940 (House) (1963). When passed, the statute provided that taxes were to be imposed on all affected transactions in foreign stock which took place after July 19, 1963,[2] the date of the President's message.

In March 1964 the bill which was to become the I.E.T. passed the House of Representatives with its retroactive features intact and its likely passage through the Senate then apparent, and, at the very same time, Henry Scharf and the defendants began to deal through dummy corporations in an arbitrage scheme designed to recover for themselves the profit that an American citizen could receive by dealing in foreign stock if he was able to evade the I.E.T.

In March 1964 Weston Trading Corporation, an American corporation controlled by Scharf through Management House, Inc. began heavy trading in foreign securities. Foreign-owned foreign stock was bought by Weston and sold as American-owned foreign stock. The money for the transactions was supplied by Scharf as Weston had no assets.

In April 1964, a similar arbitrage account was opened by defendant Samuels' father, Sidney Samuels and one

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[2] "[A] prospective date for the Interest Equalization Tax would have made it a fruitless—if not counterproductive exercise. . . . Without a retroactive effective date from the time of announcement, the outflow of capital in an extremely short period of time would have been so great that Congress could not have afforded to act." Note, Setting Effective Dates for Tax Legislation: A Rule of Prospectivity, 84 Harv. L. Rev. 436, 445 (1970).

Bernard Luckman, in the name of Hondo Trading Corporation.[3] Hondo also had no assets and the money for its purchases was supplied by Luckman and Samuels. In July 1964 Scharf acquired control of Hondo.

Weston and Hondo traded in foreign-owned foreign stock until August 1964. Blauner and Samuels were customers men at Coggeshall & Hicks, a New York brokerage house, and they handled all the transactions for the two corporations. The arbitrage profits on the sales were approximately $30,000 in addition to $177,000 paid to Blauner and Samuels in the form of brokerage commissions and other expenses. Part of these commissions were kicked back to Scharf. No I.E.T. was ever paid, although the government proved I.E.T. liabilities due on the corporations' transactions amounting to nearly $7 million.

In August 1964, after a meeting among Scharf, Blauner and Samuels, the defendants stopped trading through Weston and Hondo and Blauner began looking for an American citizen living in Canada who would be willing to sign his name to documents that showed that the stock purchases were made for his account. Binder, who was a long-time Scharf associate, introduced to Scharf one William Hazael who was an American citizen living in Canada. To get Hazael to agree to sign the necessary papers, Scharf agreed to pay him $150 per week; in return Hazael signed the necessary certificates of American ownership that were presented to them. Blauner and Samuels purchased foreign-owned foreign stock with Scharf's money in Hazael's name, from September 1964 until March 1965. The profits on these sales were $263,413 of which Hazael received only $4,939. Commissions on the sales which were

[3] Sidney Samuels was indicted as a conspirator but died prior to trial. Bernard Luckman was not indicted as he apparently was unaware of the criminal use being made of his money.

conducted by Carl Pollack, a co-worker of Samuels, amounted to $80,000, part of which Pollack kicked back to Samuels.

Although Hazael's tax returns had revealed substantial tax liabilities, no payments accompanied the returns. When the IRS moved to collect the money, Scharf told Hazael to "sit tight" and had Binder continue to pay Hazael the $150 weekly in cash. Scharf then sent Hazael an affidavit to sign which exonerated Scharf from any liability in the sale of the stocks, recited falsely that Hazael's family had an interest in local cannery, that Hazael had full knowledge of the I.E.T. and that Hazael had told Scharf that he was unaffected by the I.E.T. for which reason Scharf had undertaken to sell the stocks for him. Hazael signed the affidavit, but after thinking it over, went to the IRS with the affidavit instead of returning it to Scharf.

When Binder was summoned in July 1965 to testify before a grand jury investigating the sales, he attempted to rely on the same story as was told in the affidavit which Scharf had sent to Hazael.

We are of the view that on this evidence the convictions of the appellants do not violate the *ex post facto* clause of the Constitution.

The *ex post facto* clause erects a *per se* barrier against prosecution by the government for an act legal when done, but later made illegal. See *Calder* v. *Bull*, 3 U. S. (3 Dall.) 386 (1798). Appellants' convictions, by contrast, are all based on acts which were illegal at the time committed.

Congress unquestionably has the power to enact a tax bill with a retroactive tax effective date. See generally Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692 (1960). Once the I.E.T. became law, the tax owed on foreign-issue stock transactions had to be paid; the filing of fraudulent returns regarding such transactions was punishable under then-

existing statutes. As the proof shows, the defendants were convicted only because they attempted to evade the tax after it became due. The evidence of the appellants' action prior to the enactment of the I.E.T. did not provide the basis for their convictions, but was admitted to prove the existence of the conspiracy and its purpose, their brazen scheme to profit from evasion of a law which would soon take effect, and the wilfulness of their evasion of the tax once the law was enacted. The convictions themselves, being based on post-September 2, 1964 acts, were constitutional.[4]

Moreover, appellants all knew at the time of their illegal acts that they were violating the I.E.T. The arbitrage trading did not begin until March 1964 when in response to the imminent passage of the I.E.T., the market recognized a differential in price between foreign-owned foreign stock and American-owned foreign stock because of the anticipated tax consequences. Only sophisticated investors could have benefited from this spread. Appellants cannot now claim that they have been convicted for acts innocently done in ignorance of their liability under the law.

Counts 9 to 12, which charged Blauner and Samuels with aiding and counseling the preparation of fraudulent I.E.T. returns, listed the dates of these activities as November 24, 1964, November 30, 1964 and March 1, 1965. Since each of these dates was after September 2, 1964, it is apparent that Blauner's and Samuels' convictions on these counts did not violate the *ex post facto* clause.

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[4] Judge Mansfield's charge was properly designed to allow the jury to consider the pre-September 2, 1964 acts of appellants as some evidence of a post-September 2, 1964 conspiracy and of the appellants' wilful evasion of the I.E.T. Appellants excepted to the charge on only one ground—that no pre-September 2, 1964 acts should have been considered by the jury in its determination of whether there was an unlawful conspiracy. This request was correctly denied by Judge Mansfield for the pre-September 2, 1964 acts were evidence both of the beginnings of the enterprise and the intent of the defendants.

Appendix "A"

Count 1 charged Binder, Blauner and Samuels with conspiracy to evade payment of the I.E.T. As our account of the proof shows, there is substantial evidence that each of the three was a participant in the conspiracy and that each had engaged in overt acts after September 2, 1964. The evidence relating to pre-September 2, 1964 acts was admissible to prove the existence and purpose of the conspiracy. Since each appellant reaffirmed his participation in the conspiracy *after September 2, 1964 the* convictions do not violate the *ex post facto* clause. See *Christianson* v. *United States*, 226 F.2d 646 (8th Cir. 1955), *cert. denied*, 350 U.S. 994 (1956).

Counts 2, 4 and 6 charged Binder, Blauner, and Samuels with attempted evasion of the I.E.T. The trial judge properly charged the jury that the appellants could be convicted on all counts if it found beyond a reasonable doubt that the appellants knew that the stock purchases were not for Weston's, Hondo's or Hazael's account and if the jury found that appellants had aided in the preparation of fraudulent I.E.T. returns. These are precisely the acts for which the jury convicted Blauner and Samuels on Counts 9 to 12. Since the preparation of the fraudulent returns occurred after September 2, 1964, Blauner and Samuels can have no valid *ex post facto* claim.

There is adequate proof of Binder's complicity. He found Hazael and introduced him to the other defendants. He paid Hazael's airfare to New York. Shortly thereafter he met with Scharf and Hazael in Detroit, and the jury could have found that in Binder's presence Scharf explained to Hazael what the latter was expected to do and that Hazael was there guaranteed a job for five years. From this evidence Binder must have known that Hazael, an American citizen living abroad, was to be used as a dummy for the large purchases and sales of foreign-owned foreign secu-

rities. Moreover, after Hazael learned in January 1965 of the tremendous tax liability he had unknowingly incurred, Binder began to make the payments of the $150 weekly owing to Hazael in cash. Binder's explanation to the grand jury that he had borrowed $3,000 from Hazael and was repaying it at $150 a week was such that the jury which convicted him might have concluded that his entire story was false.

The other contention of the appellants may be disposed of briefly. They argue that the delay of their trial for three years after the indictment was brought violated their sixth amendment right to speedy trial. Not only did defendants fail to demand a trial, a prerequisite to any speedy trial claim in this circuit prior to July 5, 1971,[5] see *United States* v. *Aberson*, 419 F.2d 820 (2d Cir.), *cert. denied*, 397 U.S. 1066 (1970); *United States* v. *Maxwell*, 383 F.2d 437 (2d Cir. 1967), *cert. denied*, 389 U.S. 1057 (1968), but also they have failed to show that the delay prejudiced them in any way. Obviously one of the principal reasons for the government's delay in moving for trial was the fugitive status of Henry Scharf, the principal defendant.

Samuels argues that hearsay testimony relevant to the conspiracy count was improperly admitted against him on the substantive counts. This claim also lacks merit. In *United States* v. *Branker*, 418 F.2d 378, 380 (2d Cir. 1969), we said, "[E]vidence of what they said in order to carry out the scheme was just as relevant and admissible against anyone participating in the scheme on the trial of a substantive count as it would be on the trial of a conspiracy."

Blauner contends that his grand jury testimony was improperly admitted against him at trial because he was not advised when he appeared before the grand jury that he

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[5] Second Circuit Rules Regarding Prompt Disposition of Criminal Cases (promulgated January 5, 1971, as amended May 24, 1971).

was a potential defendant. There is substantial doubt whether the government actually thought that Blauner was a prospective defendant when he was brought before the grand jury. Thus no warning at all may have been in order. See *United States* v. *Scully*, 225 F.2d 113, 116 (2d Cir.), *cert. denied*, 350 U.S. 897 (1955) ("the mere possibility that the witness may later be indicted furnishes no basis for requiring that he be advised of his rights under the Fifth Amendment when summoned to give testimony before a Grand Jury").

In any event, before he testified Blauner was given the *Miranda* warnings. If these warnings are adequate to protect a defendant in the hostile environment of custodial interrogation they are surely sufficient with a witness appearing before a grand jury of citizens to be questioned by a government attorney, with a record of the proceedings made by a stenographer. Fully warned, Blauner elected to answer questions. His testimony was properly received in evidence. *Cf. Harris* v. *New York*, 401 U.S. 222 (1971).

Affirmed.

APPENDIX "B"

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of December one thousand nine hundred and seventy-one.

Present:

HON. J. EDWARD LUMBARD
HON. WILLIAM HUGHES MULLIGAN
HON. JAMES L. OAKES
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HENRY SCHARF, et al.,

Defendants,

WILLIAM BINDER, MAX BLAUNER, EDWARD SAMUELS,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

Order Denying Rehearing

71-1434, 71-1440, 71-1810

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HENRY SCHARF, et al.,

Defendants,

WILLIAM BINDER, MAX BLAUNER, EDWARD SAMUELS,

Defendants-Appellants.

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellant William Binder,

Upon consideration thereof, it is

Ordered that said petition for rehearing be and hereby is denied. Ordered that the issuance of the mandate be stayed pending filing of application for writ of certiorari.

WILLIAM F. MULLIGAN
JAMES L. OAKES

February 8, 1972.

Order Denying Rehearing in Banc

71-1434, 71-1440, 71-1810

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HENRY SCHARF, et al.,

Defendants,

WILLIAM BINDER, MAX BLAUNER, EDWARD SAMUELS,

Defendants-Appellants.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant William Binder and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied. Judge Mansfield took no part in the consideration of this case.

WILFRED FEINBERG
Acting Chief Judge

February 8, 1972.